86-369

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No. 86-____

UNITED STATES SUPREME COURT

October Term, 1986

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona,
Appellants,

v.

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
Appellees,

On appeal from the
United States Court of Appeals
for the Ninth Circuit

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTION PRESENTED

IS THE STATE OF ARIZONA JUSTIFIED IN REFUSING TO CONTRACT WITH A PRIVATE ENTITY IN THE STATE'S PROVISION OF FAMILY PLANNING SERVICES BECAUSE THAT PRIVATE ENTITY IS ENGAGED IN ABORTION AND ABORTION-RELATED ACTIVITIES, PARTICULARLY WHEN THAT PRIVATE ENTITY, CONTRARY TO STATE LAW, HAS USED STATE FUNDS FOR AN ABORTION-RELATED ACTIVITY?

PARTIES

Appellants are Bruce E. Babbitt, Governor of the State of Arizona; Robert K. Corbin, Attorney General of the State of Arizona; and Douglas Patino, Director of the Arizona Department of Economic Security (successor to William Jamieson).*

Appellees are Planned Parenthood of Central and Northern Arizona, an Arizona nonprofit corporation; Planned Parenthood of Southern Arizona, an Arizona nonprofit corporation; and Jack Bashaw, M.D.

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* The State of Arizona, although named in the caption of the Court of Appeals decision, was dismissed as a party by the district court.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 789 F.2d 1348 (9th Cir. 1986), and is reproduced as Appendix A. The latest decision of the District Court for the District of Arizona is unreported. It is reproduced as Appendix B. The earlier decision of the Court of Appeals for the Ninth Circuit is reported at 718 F.2d 938 (9th Cir. 1983), and is reproduced as Appendix C. The earlier decision of the District Court for the District of Arizona is reported at 537 F.Supp. 90 (1982), and is reproduced as Appendix D.

JURISDICTION

This appeal is taken from a judgment dated May 15, 1986 of the Court of Appeals for the Ninth Circuit which held that a footnote to the Arizona Appropriations Act for 1980 was unconstitutional. The Court of Appeals decision affirmed the granting of summary judgment by the District Court for the District of Arizona.

Jurisdiction of the district court was conferred by 28 U.S.C. §§ 1331 and 1343(3). Jurisdiction of the Court of Appeals was conferred by 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(2). Notice of appeal was filed in the Court of Appeals on July 3, 1986 and a copy of the notice of appeal is attached as Appendix E.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances grievances.

Fourteenth Amendment § 1 to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Footnote to the Arizona Appropriations Act, 1980:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.
>
> No state money, other than money for comprehnsive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph.

STATEMENT OF THE CASE

In 1980 the Arizona Legislature appended a footnote to its appropriations act to the Arizona Department of Economic Security. In addition to prohibiting the use of state money for abortions and abortion-related activities, the footnote forbade the Department of Economic Security from contracting or granting any state money to any entity which offered abortions, abortion procedures, counseling for abortion procedures or abortion referrals.

Planned Parenthood of Northern and Central Arizona and Planned Parenthood of Southern Arizona (hereinafter referred to as "Planned Parenthood") are Arizona nonprofit corporations which sought state funds for the provision of family planning services under Title XX of the federal Social Security Act, 42 U.S.C. § 1397, et seq. Planned Parenthood of Northern and Central Arizona offers abortion and abor-

tion-related services. Planned Parenthood of Southern Arizona does not offer abortions but offers abortion-related activities. Planned Parenthood filed an action in the district court alleging that the state law was unconstitutional on First Amendment and various other grounds. The district court found that the state law was unconstitutional on First Amendment and vagueness grounds, and enjoined the state officials from refusing to pay state funds to Planned Parenthood. The state defendants appealed to the Court of Appeals for the Ninth Circuit and the Court of Appeals reversed the district court on the vagueness issue. Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983) (Planned Parenthood I). On the First Amendment issue, the Court of Appeals in Planned Parenthood I remanded the case to determine the factual question "that withdrawing all state funds from Planned Par-

enthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities." Planned Parenthood I, 718 F.2d at 946.

On remand, additional discovery was undertaken. The discovery disclosed that Planned Parenthood of Northern and Central Arizona had used state funds for its abortion-referral activity. The state defendants argued that this use of state funds for the prohibited use demonstrated that the footnote's prohibition was constitutional in that the receipt of the money by entities which offer abortion and abortion-related activities poses the very real threat that the Arizona Legislature was attempting to prevent, i.e. that state funds would be used, accidentally or otherwise, for state-discouraged activities. On cross-motions for summary judgment, the district court granted summary

judgment for Planned Parenthood and the state defendants appealed to the Court of Appeals. The Court of Appeals affirmed, holding that, notwithstanding Planned Parenthood's use of state funds for prohibited purposes, the State could have monitored and prevented the misuse of its funds.

THE FEDERAL QUESTION IS SUBSTANTIAL

The federal question raised in this appeal is substantial. This appeal involves the fundamental question of a state's choice of how its funds should be spent and what constitutional restraints should be placed on that choice. By its legislation, the State of Arizona has demonstrated its preference for childbirth and its disfavor for abortions and abortion-related activities. As this Court said in Maher v. Roe, 432 U.S. 464, 477 (1977), the state "is not required to show

a compelling interest for its policy choice to favor normal childbirth" and "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 475. See also Harris v. McRae, 448 U.S. 297 (1980).

Arizona's policy choice in this case does not interfere with Planned Parenthood's abortion or abortion-related activities. Arizona's policy simply provides that no state funds should go to them because they engage in abortion and abortion-related activities. Planned Parenthood has no constitutional or statutory right to state funds, nor is the State obligated to contract with them. This situation is similar to the constitutionality of the federal and state Hatch Act provisions upheld by this Court in Broadrick v. Oklahoma, 413 U.S. 601 (1973), and United

States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973). As this Court said in Letter Carriers, "The government has an interest in regulating the conduct and the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general" (citing Pickering v. Board of Education, 391 U.S. 563, 568). Id. at 564.

It is clear from the federal law that family-planning programs under Title XX are state-sponsored programs to be run by the states.[1] Accordingly, the entities contracting with the State of Arizona will run this program as agents of the State. This agency relationship justifies Arizona's decision that its family planning program should not be operated by an

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1. 42 U.S.C. § 1397, et seq.

entity which offers simultaneously abortion and abortion-related activities. When contracting to perform these services, Planned Parenthood assumes the role of a state agency. Therefore the State has a legitimate interest in the furtherance of its policy to promote human life, to require that its agencies dissociate themselves from abortion and abortion-related activities. This policy choice is identical to the one in Letter Carriers, where Congress determined that "it is essential that federal employees, for example, not take formal positions in political parties . . .." Id. at 565.

Appellants submit that Arizona's interest here is very similar to the interests underlying the federal Hatch Act. Arizona can constitutionally insist that its agent in the provision of family planning services refrain from engaging in activities which are disfavored by the State

--abortion and abortion-related activities.[2/]

Arizona's placing such a condition on the receipt of its funds is no different from the federal government's requirement that recipients of federal funds, by grant or otherwise, abide by the federal Hatch Act, which was upheld by this Court in Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947). Likewise, notwith-

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2. This argument was presented to the Court of Appeals in the state defendants' briefs in Planned Parentood I. Inexplicably, the court's opinion failed to address that issue. Presumably, it was rejected sub silentio. Appellants believe that this issue is properly before this Court because the state defendants could not have appealed from Planned Parenthood I under 28 U.S.C. § 1254(2) because they were the prevailing parties in that appeal. Moreover, this Court is not bound by the law-of-the-case doctrine of the intermediate appellate courts. Hathorn v. Lovorn, 457 U.S. 255, 261 (1982); Davis v. O'Hara, 266 U.S. 314, 321 (1924). Also, the Court of Appeals for the Ninth Circuit's law of the case doctrine is such that the panel in Planned Parenthood II could not have overruled Planned Parenthood I. See City of Seattle v. Puget Sound Power & Light Co., 15 F.2d 794 (9th Cir. 1926).

standing the First Amendment, Congress "may condition acceptance of public funds on an agreement by the candidate to abide by specific expenditure limitations." Buckley v. Valeo, 424 U.S. 1, 57, no. 65 (1976).

Next, the Court of Appeals opinion in Planned Parenthood II held that it was incumbent upon the State to monitor Planned Parenthood to insure that state funds would not be used for the disfavored purposes. That rationale is unprecedented and imposes a most onerous and impossible burden on the State. It is onerous because of the expense of monitoring. The state funds involved here came to $4,700. The cost of monitoring would be greatly disproportionte to the $4,700 involved. Moreover, the monitoring task is virtually impossible, since the decision whether to refer a particular individual for an abortion is in the hands of Planned Parent-

hood, and the State cannot intrude upon that physician-patient relationship. Accordingly, despite assurance to the contrary, a social worker or doctor can breach that assurance and no monitoring can prevent that from happening. The possibility of that breach becomes very real when the very same entity which provides the family planning services is offering abortion and abortion-related activities side by side with the State's family planning services. The additional discovery conducted after the remand in Planned Parenthood I demonstrates this point perfectly. Notwithstanding the representations to the State[3] by Planned Parenthood in

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3. The "affidavit by state officials" referred to by the Court of Appeals' opinion (Appendix A at p. 7) refers to the depositions of state officials, Gary Mikkelsen and Betty DeGraw, which were taken shortly after the filing of the lawsuit in 1980, long before the remand in Planned Parenthood I. Both witnesses testified regarding the as-

by Planned Parenthood in 1980 that, on their books, state funds would be segregated, after the remand in Planned Parenthood I, additional discovery showed that, despite the assurance, state money was used for abortion referral. In light of this experience, the State should not be subject to the requirement of monitoring when common sense teaches us that monitoring under these circumstances is meaningless.

Arizona's footnote to its Appropriations Act of 1980 reflects a legitimate state policy of ensuring that state-funded agencies not be identified with the disfavored abortion and abortion-related

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3 (Cont'd).

surances made by Planned Parenthood as to the segregation of funds based on its bookkeeping system. The "monitoring" referred to in Mikkelsen's deposition was in the context of the way the "books are set up" and not "monitoring" in the general sense.

activities. It is also a legitimate means of ensuring that its funds not be expended on these disfavored activities. The Court of Appeals' decision invalidating the state law is at odds with the controlling decisions of this Court and is erroneous.

CONCLUSION

For the reasons set forth herein, this Court should note probably jurisdiction and reverse the Court of Appeals' decision.

Respectfully submitted

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No. 86-____

UNITED STATES SUPREME COURT

October Term, 1986

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona,
Appellants,

v.

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
Appellees,

On appeal from the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT DATED MAY 15, 1986

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corp.; tion; Planned Parenthood of Southern Arizona, an Arizona non-profit corp.; Jack Bashaw, M.D., on behalf of himself, his patients, and all others similarly situated, Plaintiffs-Appellees,

v.

The STATE OF ARIZONA; Bruce E. Babbitt, individually and as Governor of the State of Arizona; William Jamieson, individually and as Director of the Department of Economic Security; Robert K. Corbin, individually and as Attorney General of the State of Arizona, their employees, agents, representatives, successors, and those acting in concert with them and all others similarly situated, Defendants-Appellants.

No. 85-1612.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 12, 1986.

Decided May 15, 1986.

Appeal from the United States District Court for the District of Arizona

Before: SNEED and HALL, Circuit Judges, and KELLEHER,* District Judge.

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* Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

SNEED, Circuit Judge:

This is an appeal from a district court's grant of a summary judgment holding unconstitutional, as sought to be applied against Planned Parenthood and its patients, a portion of an Arizona appropriation bill and awarding attorneys' fees to the plaintiffs. We affirm the district court's judgment on the merits, modify the attorneys' fee award, and award attorneys' fees on appeal.

I.

FACTS

Arizona participates in a Title XX federal grant program that provides federal reimbursement for 90% of the expenditures Arizona makes for certain family planning services. Arizona allocates 10% matching funds to pay for these services. See Planned Parenthood v. Arizona, 718 F.2d 938, 941 (9th Cir. 1983) (Planned

Parenthood I). This controversy has its origins in a restriction on use of the state funds for abortion-related activities. The restriction was contained in a two-paragraph footnote to the Arizona bill appropriating the state's ten percent matching funds. It consists of two paragraphs and reads as follows:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of the pregnant woman.
>
> No state money, other than money for comprehnsive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph.

1980 Ariz. Sess. Laws 842, 860 n*.

Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (collectively referred to as Planned Parenthood) brought suit to enjoin enforcement of this footnote. They argued that the footnote is an unconstitutional restriction on their freedom of speech and is void for vagueness. In 1982, the district court held that the footnote is unconstitutional on both first amendment grounds and vagueness grounds. In 1983, this circuit held that the statute is not unconstitutionally vague. Planned Parenthood I, 718 F.2d at 949. Its resolution of the first amendment issue was more complex.

The first paragraph of the Arizona statute prohibits the use of state funds for abortion-related services. Relying on Maher v. Roe, 432 U.S. 464 (1977), Planned Parenthood I upheld this portion of the statute. See 718 F.2d at 942-44. The

second paragraph of the statute prohibits use of state funds by organizations that offer abortion-related services, even if the state funds themselves are not used for abortion-related services. Planned Parenthood in our first encounter characterized this portion of the statute as a penalty designed to chill the exercise of the constitutional right to provide abortions. The State argued to the Planned Parenthood I panel that this second paragraph of the statute was constitutional because, since it was impossible for the state to monitor use of the funds to prevent their use for abortion-related services, it was a measure necessary to the enforcement of the constitutionally proper first paragraph. The Planned Parenthood I panel remanded "to give the State the opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Par-

enthood would not use state funds to support its abortion-related activities." Id. at 946.

On remand, the district court received depositions on this issue and granted summary judgment for Planned Parenthood. The State appeals. It argues, first, that the district court erred in granting summary judgment for Planned Parenthood; second, that the district court included improper costs in the fee award; and, third, that the district court erred in awarding Planned Parenthood an upward adjustment of the attorneys' fee award above the "lodestar" amount. Planned Parenthood also seeks attorneys' fees for the cost of defending against the State's appeal.

II.

MOOTNESS

The State in its first argument appears to frame a strange and simplistic proposition. It proceeds as follows. Planned Parenthood of Northern and Central Arizona spent funds on "counseling for abortion procedures or abortion referrals" that had their source, in part, in State funds. This expenditure demonstrates that "withdrawing all state funds from Planned Parenthood . . . [is] the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities." Id. at 946. This, in turn, removed any cloud of possible unconstitutionality from paragraph two of the Arizona footnote and rendered any dispute on this issue moot.

The flaw in the argument is that Planned Parenthood's expenditure by no means demonstrates that withdrawal of

funds is necessary to prevent violation of the footnote's first paragraph. The argument of the State renders this court's remand in Planned Parenthood I an exercise in futility. Had we assumed, as the State does in its argument, that any expenditure on abortion-related activities necessarily is derived from state funds at least to the extent of ten cents on the dollar, the remand would have been pointless. The constitutionality of the second paragraph on the basis of this assumption should have been confronted in Planned Parenthood I. Not having done so, we obviously rejected the State's assumption. We proceeded on the basis that it was the burden of the State to show that ear-marking of state funds for non-abortion-related activities and a system of tracing reasonably susceptible to auditing by state officials was not possible to create.

Thus, the question before us is

whether the State has made such a showing. It is not moot. See 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533, at 212 (1984).

III.

CONSTITUTIONALITY OF THE STATUTE

We review the district court's grant of summary judgment de novo. See, e.g., Lojek v. Thomas, 716 F.2d 675, 677 (9th Cir. 1983).

Turning to the merits, we note that neither of the parties have attempted to persuade us to reconsider the Planned Parenthood I decision. Moreover, it is clear that on remand the showing made by the State does not establish the impossibility of monitoring funds. Affidavits by State officials charged with distributing the funds, which are not controverted, established that monitoring was feasible. See Excerpt of Record (E.R.) at 40-41 (deposi-

tion of Guy Mikkelsen); id. at 43 (deposition of Betty DeGraw).

Planned Parenthood also produced substantial evidence before the district court on the issue of feasibility of monitoring. Finally, in its brief to this court, the State has conceded that the spending practices of the Southern Arizona branch of Planned Parenthood adequately segregate state funds from abortion-related services. Appellant's Opening Brief at 9 n. 3.

The State contends that the spending practices of Planned Parenthood of Northern and Central Arizona demonstrate the impossibility of monitoring. This is simply not so. The State to monitor effectively need not be present at every client and patient interview. The fact is that the State has not attempted to monitor expenditures by Planned Parenthood. The most that can be said is that misuse of

funds is possible so long as the State fails to monitor spending. This is a far cry from evidence that monitoring is not possible.

In short, Planned Parenthood has submitted convincing evidence on the feasibility of monitoring the funds. The State has not controverted that evidence and even admits that Planned Parenthood of Southern Arizona has successfully segregated state funds from its abortion-related expenditures. We hold, after a de novo review, that the district court's grant of summary judgment on the constitutionality of paragraph two of the Arizona footnote as applied against Planned Parenthood and its patients was proper.

IV.

ATTORNEYS' FEES IN THE DISTRICT COURT

Because Planned Parenthood prevailed in the litigation, the district court

awarded its attorneys' fees under the Civil Rights Attorney Fee Award Act of 1976, 42 U.S.C. § 1988. It calculated the award in two steps. First, it multiplied the number of hours Planned Parenthood attorneys spent on the case by the customary hourly rates of those attorneys. This produced the "lodestar amount." Second, it increased that award by a multiplier of ten percent. The State objects to this award on two fronts. First, it argues that the award included "excessive, redundant, or otherwise unnecessary" costs. Appellant's Opening Brief at 12-13. Second, it challenges the application of the multiplier in light of Blum v. Stenson, 465 U.S. 886 (1984).

At the outset we note that determination of attorneys' fees "is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." Rutherford v. Pitchess, 713

F.2d 1416, 1420 (9th Cir. 1983); see Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (emphasizing "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters"). We also acknowledge that looking over the shoulders of attorneys to examine their charges is not a task welcomed by judges. Fee shifting makes our scrutiny necessary, however. Even though our competence to undertake this scrutiny is limited at best, we must assume the burden because at present no other bearer is available. Somebody must decide what fees should appropriately be shifted to the loser. No doubt our "incompetence" in this area is no greater than it is in many others in which we are compelled to render decisions; and it is, I suspect, our limited ability to avoid decisionmaking, in comparison to that enjoyed by the other

two great branches of government, that induces many litigants to crowd our portals.

So, in full awareness of our limitations, we address the issue of attorneys' fees.

A. The "Excessive" Costs Issue

The State relies on Hensley v. Eckerhart for its argument that the district court's award forces the State to reimburse Planned Parenthood for improper expenses. Hensley discussed the adjustments district courts should make in section 1988 awards when plaintiffs have been only partially successful. In the course of that discussion, the Court explicated its views on calculation of the lodestar amount. The Court's ideas regarding excess cost are both reasonable and not unusual:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or

> otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."

461 U.S. at 434 (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)) (emphasis by Copeland court).

Hours expended in pursuit of unsuccessful claims in civil rights cases were treated as follows:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of the counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . ..

Id. at 435.

Neither hours not properly billed to one's client nor hours expended on discrete and unsuccessful claims exist in this case. The State lists four categories of attorney effort to which it objects:

> time spent for the unsuccessful attempt to name the State of Arizona as a defendant; their attempt at garnishment to collect the previously awarded attoneys' fees judgment; the time spent on whether the preliminary injunction appeal was moot pursuant to this Court's request; and the time spent on the void-for-vagueness issue which this Court has decided in the defendant's favor.

Appellant's Opening Brief at 12. We think that a reasonable client who had received the results obtained in this litigation would not cavil at being billed for these

ancillary efforts. We also think that it is improper in this case to categorize any of these efforts as discrete claims. The thrust of this lawsuit was Planned Parenthood's effort to continue receiving state funds. All of these activities are aimed at that result. We hold that all of the challenged activities are properly compensable by an attorneys' fee award under section 1988.

B. Use of a Multiplier Issue

We approach the use of a multiplier somewhat differently, however. In Planned Parenthood I, the panel concluded that "there is nothing to suggest that the court abused its discretion in any way in determining the appropriate 'multiplier' or adjustment factor." 718 F.2d at 951. First, because the panel vacated the fee award when it remanded the case for further factfinding on the first amendment

claim, we are not bound by the Planned Parenthood I panel's consideration of the attorneys' fee issue. It is clear that the court's evaluation of the use of the multiplier was dicta. See 718 F.2d at 951.[1/] Moreover, because the Supreme Court has recently decided a case on this question, Blum v. Stenson, 465 U.S. 886 (1984), we are less inclined than we might ordinarily be to adopt the conclusions of the prior panel without independent consideration. See Kimball v. Callahan, 590 F.2d 768, 771-75 (9th Cir.), cert. denied, 444 U.S. 826 (1979); White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4478, at 790-91 (1981).

Planned Parenthood suggests two justifications for imposition of a multiplier in this case: the plaintiff's success in the lawsuit and the contingency of recov-

ery. Our examination of Blum v. Stenson convinces us that neither of these factors justifies the use of a multiplier in this case.

In Blum v. Stenson, the Court discussed the manner in which a plaintiff could justify a section 1988 fee award in excess of the lodestar amount. The Court stated that "[t]he burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant." 465 U.S. at 898. The Court went on to reverse the district court's imposition of a multiplier because the plaintiff "introduced no evidence that enhancement was necessary to provide fair and reasonable compensation." Id. at 901.

Planned Parenthood attempts to justify use of the multiplier by pointing to the success of their efforts. This is inadequate justification. As the Supreme Court pointed out in Blum v. Stenson, see

id. at 900, adequate compensation for the success of a civil rights plaintiff will normally be secured by an award based on the number of hours billed and the billing rate of the attorneys. Many clients with reasonable bargaining power would insist upon paying no more. We do not think the State of Arizona should be required to shoulder a greater burden.

The Supreme Court also addressed the factors of risk and contingency of recovery as bases for upward fee adjustments. The Court seemed to approve an adjustment based on "risks associated with the litigation or claim that the risk of nonpayment required an upward adjustment to prove a reasonable fee." Id. at 901; accord LaDuke v. Nelson, 762 F.2d 1318, 1332-33 (9th Cir. 1985) (EAJA case); Hall v. Borough of Roselle, 747 F.2d 838, 843 (3d Cir. 1984) (section 1988 case). The Court's language apparently refers to the

contingent fee arrangement common to many areas of the law. At oral argument, however, counsel for Planned Parenthood conceded that the fee arrangement in this case was not contingent.

Planned Parenthood's argument is slightly different. It argues that the controversial nature of the abortion issue makes "risky" the representation of clients like Planned Parenthood. It argues that controversial representation may have an adverse effect on the law firm's other business by soiling its reputation. We recognize that the "undesirable" nature of a case is an appropriate factor in determining attorneys' fees. See, e.g., Kerr v. Screen Extras Guild, 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974), cited with approval in S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (legislative

history of § 1988), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913.

Nevertheless, we reject this contention as a justification for the imposition of a multiplier in this case. Controversial representation is just as likely to bolster the reputation of a law firm as it is to harm it. Planned Parenthood may have its enemies; but it also has many friends. It is hardly a pariah. Moreover, there is no evidence in the record that the representation actually posed a substantial risk to the law firm's business or that any risk presented was not adequately taken into consideration in setting the hourly rate. The Supreme Court's opinion in Blum predisposes us against the use of a multiplier unless the successful plaintiff has demonstrated that a lodestar amount does not represent a fully compensatory fee. The plaintiffs in this case have made no such showing, but

rely instead on abstract arguments in their brief. Accordingly, we reverse the district court's judgment to the extent that it applied a multiplier in calculating the fee award.

V.

ATTORNEYS' FEES ON APPEAL

Planned Parenthood seeks attorneys' fees on appeal under section 1988. As the Supreme Court has noted, "a prevailing [civil rights] plaintiff '"should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."'" Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912). Planned Parenthood clearly has prevailed on the merits of this appeal. There are

no circumstances making such an award unjust. We hold, therefore, that Planned Parenthood is entitled to attorneys' fees for the reasonable expenses of this appeal. The judgment of the district court is affirmed in part, reversed in part.

AFFIRMED IN PART, REVERSED IN PART.

FOOTNOTE

1. On this point we stated: "[W]e vacate the attorneys' fee award pending the outcome on reconsideration. However, we note that we find nothing improper in the manner in which the district court computed the attorneys' fee." In this circuit, dicta are "not part of the law of the case." Russell v. Commissioner, 678 F.2d 782, 785 (9th Cir. 1982). We are, therefore, free to disregard our earlier statements on this point.

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JANUARY 7, 1985
UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corporation, et al.,	)	No. CIV 80-665 PHX WEC
Plaintiffs,	)	JUDGMENT
v.	)	
THE STATE OF ARIZONA, et al.,	)	
Defendants.	)	

Plaintiffs Planned Parenthood of Central and Northern Arizona, Planned Parenthood of Southern Arizona, and Dr. Jack Bashaw, having moved for summary judgment on the issue identified by the Ninth Circuit in its decision remanding the case to this Court (718 F.2d 938 (1983)); and the Court having considered the parties' memoranda, the affidavits submitted by plaintiffs, the statements of facts submitted by the parties, oral argument of counsel, and all other matters of record,

the Court finds as follows:

1. The basis upon which the Ninth Circuit remanded this Court's previous grant of summary judgment to plaintiffs on plaintiffs' free speech claim (Fourth Claim for Relief), was to give the State an opportunity to attempt to prove that "withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion related activities," 718 F.2d at 946.

2. Subsequent to remand on this issue, plaintiffs moved for summary judgment, supported, inter alia, by affidavits, and by the deposition testimony of state officials, contending that no material fact issue precluding summary judgment existed with respect to the issue identified in quotes in the preceding paragraph.

3. Defendants have failed to pre-

sent to this Court any material matter of fact with respect to the issue identified by the Ninth Circuit.

4. It is therefore:

a. ORDERED granting plaintiffs' Motion for Summary Judgment as to its Fourth Claim for Relief, and permanently enjoining defendants from enforcing the unconstitutional legislation at issue; and it is further

b. ORDERED denying defendants' Cross-Motion for Summary Judgment; and it is further

c. ORDERED upon consideration of the memoranda and oral argument of counsel, and of all pertinent factors (as identified, for example, in

Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976)) (reinstating this Court's earlier award of attorneys' fees and costs in the principal sum of $37,045.96* (plus interest at the legal rate from July 29, 1981), and awarding plaintiffs additional attorneys' fees in the principal sum of $36,335.20 (plus interest at the legal rate from the date of entry of this Judgment), for a total attorneys' fees award in the principal sum of $72,195.20, and costs of $1,185.96.

5. This Court determines that there is no just reason for delay in the entry

of this Judgment, and Judgment is expressly directed to be entered forthwith.

6. It is further ORDERED that process as necessary to execute upon this Judgment shall issue.

DATED this 7th day of January, 1985.

Honorable Water E. Craig, Judge, United States District Court, District of Arizona

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* Fees: $35,860.00; Costs: $1,185.96.

APPENDIX C

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT DATED FEBRUARY 18, 1983

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corporation; Planned Parenthood of Southern Arizona, an Arizona non-profit corporation; Jack Bashaw, M.D., on behalf of himself, his patients, and all others similarly situated, Plaintiffs-Appellees,

v.

The STATE OF ARIZONA; Bruce E. Babbitt, individually and as Governor of the State of Arizona; William Jamieson, individually and as Director of the Department of Economic Security; Robert K. Corbin, individually and as Attorney General of the State of Arizona, their employees, agents, representatives, successors, and those acting in concert with them and all others similarly situated, Defendants-Appellants.

No. 82-5437.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 18, 1983.

Decided Oct. 18, 1983.

Appeal from the United States District Court for the District of Arizona

Before: CHOY and ALARCON, Circuit Judges, and D. WILLIAMS,* District Judge.

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* The Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

CHOY, Circuit Judge:

Planned Parenthood instituted this suit to challenge the constitutionality of a footnote to an Arizona appropriation bill that forbade the expenditure of state social welfare funds to support nongovernmental organizations that perform abortions and engage in abortion-related activities. The district court, on a motion for summary judgment, declared the footnote unconstitutional and permanently enjoined its enforcement. Planned Parenthood of Central & Northern Arizona v. Arizona, 537 F.Supp. 90 (D.Ariz. 1982). The State now appeals the summary judgment, the attorneys' fee awarded to Planned Parenthood, and a preliminary injunction issued during the course of the litigation.

I. Background

Arizona is a participant in a Title XX federal grand-in-aid program that pro-

vides federal funds for family planning services offered as a part of a state's social welfare program. During the period relevant to this suit, the federal government reimbursed a state for 90% of expenditures made for qualified family planning services, whether the state provided those services itself or contracted with private organizations to provide them. 42 U.S.C. § 1397a(a)(1) (Supp. III 1979), amended by 42 U.S.C. § 1397a (Supp. V 1981); 45 C.F.R. §§ 228.70 et seq. (1978) (recodified 1980; repealed 1981). The providing agency or organization had to secure a 10% matching fund from state or private sources in order to complete funding for the services and to remain eligible for the 90% federal assistance. 45 C.F.R. §§ 228.53-.54 (1978) (recodified 1980, repealed 1981).

The State of Arizona had been providing the 10% matching funds to private organizations that provided family plan-

ning services under contract with the State. However, effective throughout the fiscal year from July 1, 1980, to June 30, 1981, the State of Arizona enacted a footnote to its General Appropriations Bill that forbade the Department of Economic Security from giving state money to any nongovernmental "agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals." 1980 Ariz.Sess.Laws 842, 860 n. *.[1/]

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1. The footnote at issue read, in relevant part:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.
>
> No state money, other than money for comprehnsive medical and dental care and the developmentally disabled, may be given by

Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (collectively referred to as Planned Parenthood) are private, nonprofit, tax-exempt Arizona corporations that provide a full range of family planning services, including Title XX services provided under contract to the State of Arizona. Planned Parenthood of Central and Northern Arizona performs abortions and both organizations offer abortion referrals and abortion counseling. Thus, the Arizona Department of Economic Security, in order to comply with the statutory footnote, withheld state funding from Planned Parenthood.

Despite the loss of state funding,

> the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are

Planned Parenthood continued to operate as a provider of state family planning services and to receive federal Title XX funds. Under an arrangement with the State of Arizona, private funds contributed by Planned Parenthood, instead of state funds, were used to meet the 10% matching-fund requirement. The fiscal 1980-1981 contract between Arizona and Planned Parenthood called for $47,000 in family planning services. Planned Parenthood brought suit in the district court to enjoin enforcement of the footnote to the appropriations bill.

On October 7, 1980, the District court preliminarily enjoined the defendants from complying with the challenged footnote, thus forcing the State to pro-

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exempt from the restrictions in this paragraph.

1980 Ariz.Sess. Laws 842, 860 n. *.

vide 10% of the total contract amount (i.e., $4,700) in state funds to Planned Parenthood. The State of Arizona appealed the preliminary injunction, but the appeal was dismissed as moot after the district court declared the Arizona footnote unconstitutional and issued a permanent injunction on February 8, 1982. The district court's reasons for declaring the footnote unconstitutional were (1) that it infringed Planned Parenthood's freedom of speech and (2) that it was void for vagueness. On this appeal, the State of Arizona challenges the merits of the district court's decision declaring the footnote unconstitutional and enjoining its enforcement, the correctness of the issuance of the prelimiary injunction, and the award of attorneys' fees.

II. Free Speech Claim

In setting forth their positions,

both Planned Parenthood and the State of Arizona invoke principles of law well established in Supreme Court doctrine. The thrust of Planned Parenbthood's argument is that the effect of the Arizona footnote is to penalize Planned Parenthood for exercising its constitutional right to freedom of speech;[2] "abortion referral" and "counseling for abortion procedures" are constitutionally protected speech, and the State of Arizona cannot declare such activities to be illegal. See Bigelow v. Virginia, 421 U.S. 809, 811, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (statute making it a misdemeanor to sell or circulate any publication encouraging or prompting

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2. The first amendment prohibition against infringement of freedom of speech is applicable to the states through the fourteenth amendment. Bigelow v. Virginia, 421 U.S. 809, 811, 95 S.Ct. 2222, 2227, 44 L.Ed.2d 600 (1975); Schneider v. State, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939).

the procuring of an abortion declared an infringement of freedom of speech).

Planned Parenthood argues, and the dictrict court agreed, that the challenged Arizona statute is an unconstitutional attempt to do indirectly what the State could not do directly. In other words, Planned Parenthood maintains that instead of instituting a criminal penalty that restricts freedom of speech, the State is attempting to dissuade constitutionally protected speech activities by withdrawing a government benefit from those who engage in such activities.

The Supreme Court has clearly articulated that government may not restrict exercise of constitutionally protected rights, even when that restriction takes the form of withholding a benefit, rather than applying a penalty, for that exercise.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

For example, in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), a Seventh Day Adventist challenged a South Carolina law denying unemployment benefits to persons who failed without good cause to accept employment.

The State declined to recognize as good cause her refusal to work on Saturday for religious reasons. The Supreme Court emphasized that the law placed her in a position of having to choose between denying the precepts of her religion and forfeiting benefits. Therefore, the Court found that the operation of the statute imposed a burden on the plaintiff's free exercise of her religion:

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry . . .. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice

> puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 403-04, 83 S.Ct. at 1793-94 (footnotes omitted).

Similarly, the Supreme Court struck down a California statute that limited a tax exemption to those members of the exempted class who affirmed their loyalty to the state government. California was under no obligation to grant such an exemption; the benefit was gratuitous. Yet, the Court found that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of the first amendment right of expression. Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). See also Thomas v. Review Board

of the Indiana Employment Security Division, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (denial of unemployment benefits to Jehovah's Witness who left job for religious reasons declared unconstitutional); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (dismissal from nonpolicymaking position on basis of political affiliation declared unconstitutional); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (denial of welfare benefits to new residents unconstitutionally infringes right to travel).

We, of course, are bound by and endorse such precedent, but we do not agree that the principle articulated in Perry is dispositive of the present case. The Supreme Court has also unequivocally stated that a state has no constitutional obligation to fund or promote abortion and "is not required to show a compelling interest

for its policy choice to favor normal childbirth." Maher v. Roe, 432 U.S. 464, 477, 97 S.Ct. 2376, 2384, 53 L.Ed.2d 484 (1977). As the Court acknowledged in Maher, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 475, 97 S.Ct. at 2383 (footnote omitted).

Planned Parenthood argues that the State has waived its option to refuse to fund abortion or abortion-related activities by affirmatively deciding to fund family planning programs. According to Planned Parenthood, once the State has made an affirmative decision to fund family planning programs, the State cannot withhold funds from otherwise eligible providers solely because they promote and engage in constitutionally protected family planning methods the State disfavors.

However, the Supreme Court's opinion in Maher expressly rejected similar logic.

In Maher, the Court rejected the holding of the district court panel that "abortion and childbirth . . . are simply two alternative medical methods of dealing with childbirth" and that if a state decides to fund one, it must also fund the other in order to avoid "weight[ing] the choice of the pregnant mother against choosing to exercise her constitutionally protected right" to have an abortion. Id. at 468, 97 S.Ct. at 2379. The Supreme Court held that a state could refuse to fund abortion while funding childbirth because its refusal "place[d] no obstacles . . . in the pregnant woman's path to an abortion." Id. at 474, 97 S.Ct. at 2382. And, the Court said that the "State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restric-

tion on access to abortions that was not already there." Id. Similarly, Arizona's decision to refuse to fund abortion and abortion-related speech activities may make childbirth and advocation of childbirth more attractive alternatives, but it has imposed no restriction on access to abortions or on the free flow of information concerning abortion.

Supreme Court precedent in the area of private-school education is analogous. In Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court invalidated an Oregon criminal law requiring the parent or guardian of a child to send him to public school, thus precluding the choice of a private school. The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-35, 45 S.Ct. at 573-74.

Later in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), the Court explicitly rejected the argument that Pierce established a "right of private or parochial schools to share with public schools in state largesse," for "[i]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid." Id. at 462, 93 S.Ct. at 2809.

We conclude that the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities, but the State need not support, monetarily or otherwise, those activities.

A federal district court in Illinois, faced with a case similar to the present one, upheld as constitutional the portion of a state grant-in-aid program

disqualifying applicants that provide abortion counseling and referral services. That court aptly described the situation:

> Planned Parenthood's application for funds under the Act indicates that it would have used the funds for a program which includes abortion-related services. Therefore, it is Planned Parenthood which seeks to interfere with the right of [the State] to decline to encourage abortions, rather than the converse. Planned Parenthood seeks to compel [the State] to adopt a position of neutrality; subsidizing childbirth and abortion-related counseling and referral services on an equal basis. However, as [Harris v.] McRae [488 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980)] and Maher clearly indicate, there is no requirement that the state be neutral vis-a-vis abortion. It is free to express its preference for childbirth, by subsidizing it and not abortion.

Planned Parenthood Association--Chicago Area v. Kempiners, 531 F.Supp. 320, 325 (N.D.Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir. 1983).

The question we must address in order to resolve this case is whether the

Arizona statute embodies merely the State's refusal to fund activities it disfavors, or whether the State unduly interfered with Planned Parenthood's exercise of its right to perform abortion and abortion-related services. The State's constitutional purpose of promoting childbirth over abortion "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964), quoted in Griswold v. Connecticut, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965). We think it significant that the State allowed Planned Parenthood to continue as a Title XX provider of family planning services by contributing private funds in lieu of receiving state funds, thus making Planned Parenthood eligible for federal matching funds. The Arizona footnote withdrew only

10% of the governmental funding Planned Parenthood had been receiving for family planning services; the organization continued to receive the 90% of the funding that came from federal sources. Arizona could have placed a much more onerous burden on Planned Parenthood by refusing to operate as the channel through which the organization received federal Title XX funds. The fact that the statute withdrew only state, and not federal, funds from Planned Parenthood indicates that the Arizona legislature's main concern was to ensure that state funds not be used in a manner contrary to state social welfare policy and not, as Planned Parenthood argues, to deter the organization from engaging in constitutionally protected activities.

However, it is not clear that the statute was drawn as narrowly as possible to permit the State to control use of its

funds while infringing minimally on exercise of constitutional rights. The statute withheld all state funds from nongovernmental entities offering "abortions, abortion procedures, counseling for abortion procedures or abortion referrals." A more narrowly drawn statute, which would accomplish the stated purpose of ensuring that state funds not be spent on activities the state legislature disfavors, would simply forbid entities receiving state funds from using those funds for abortions and the related activities listed above.

Arizona argues that such a narrowly drawn statute was infeasible for two reasons. The first is that the administrative difficulty of monitoring Planned Parenthood's use of the funds would make such monitoring impossible or highly impractical. The second reason is that even if the State could monitor Planned Parent-

hood's use of state funds in order to ensure that those funds did not support disfavored activities, state funding of any of Planned Parenthood's programs would "free up" funds to support abortion-related activities. We will deal with the second of these arguments first.

Other courts have looked upon the freeing-up theory with disfavor, see, e.g., Planned Parenthood of Minnesota v. Minnesota, 612 F.2d 359, 361 (8th Cir.), aff'd mem., 448 U.S. 901, 100 S.Ct. 3039, 65 L.Ed.2d 1131 (1980); Planned Parenthood Association--Chicago Area v. Kempiners, 568 F.Supp. 1490, 1495 (N.D.Ill. 1983), and we hold that as a matter of law, the freeing-up theory cannot justify withdrawing all state funds from otherwise eligible entities merely because they engage in abortion-related activities disfavored by the state. Applying the logic of the freeing-up argument to another setting

shows its hazards. It can be argued that by providing welfare benefits to a pregnant indigent woman, a state would be freeing up whatever other funds she may have at her disposal for use in paying for an aborion. Thus, the freeing-up argument, when coupled with the holding of Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (states are not constitutionally required to fund therapeutic abortions as part of their Medicaid programs), would lead to the conclusion that a state could refuse all Medicaid benefits to an otherwise eligible applicant because she had exercised her right to have an abortion. Although the Supreme Court has never addressed such a situation, the Court did mention in a footnote to Harris v. McRae that a statute withdrawing all Medicaid benefits from an eligible recipient who had an abortion would pose "[a] substantial constitutional question" and

implied that such a statute would impose an unconstitutional penalty on the Medicaid recipient. 448 U.S. 297, 317 n. 19, 100 S.Ct. 2671, 2688 n. 19, 65 L.Ed.2d 784 (1980).[3/]

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3. Even before the Harris opinion, the Supreme Court had noted the distinction between refusing to fund abortion and withdrawing all welfare benefits from an indigent woman who had obtained an abortion:

> Appellees rely on Shapiro v. Thompson, 394 U.S. 618 [89 S.Ct. 1322, 22 L.Ed.2d 600] (1969), and Memorial Hospital v. Maricopa County, 415 U.S. 250 [94 S.Ct. 1076, 39 L.Ed.2d 306] (1974). In those cases durational residence requirements for the receipt of public benefits were found to be unconstitutional because they "penalized" the exercise of the constitutional right to travel interstate.
>
> . . .
>
> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in Shapiro, and strict scrutiny

The State's first argument against a more narrowly constructed statute--that monitoring Planned Parenthood's use of funds is administratively impossible--is a question of fact. Because the district court declared the statute at issue to be unconstitutional on a motion for summary judgment, the State has never had an opportunity to prove its contention. We, therefore, reverse the summary judgment and remand to give the State the opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities.

> might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions.

Maher v. Roe, 432 U.S. 464, 474 n. 8, 97 S.Ct. 2376, 2383 n. 8, 53 L.Ed.2d 484 (1977).

III. Vagueness

The district court found the statute to be void because the term "counseling for abortion procedures" is vague. The State of Arizona questions both the standing of Planned Parenthood to challenge the statute on the vagueness ground and the district court's finding of vagueness. While we hold that Planned Parenthood did have standing to challenge the statute as unconstitutionally vague, we further hold that the term "counseling for abortion procedures" is not so vague as to render the statute void.

The general rule with respect to standing to challenge a law as unconstitutionally vague is that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974); see Broadrick v. Oklahoma, 413 U.S. 601, 608,

93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973); Dombrowski v. Pfister, 380 U.S. 479, 491-92, 85 S.Ct. 1116, 1123-24, 14 L.Ed.2d 22 (1965). The State of Arizona argues that since the challenged statute withholds state funds from entities that perform abortions and since there is no contention that the terms "abortions" or "abortion procedures" are vague, Planned Parenthood has no standing to challenge the statute, for the statute clearly applies to Planned Parenthood's activities. The flaw in this argument is that only one branch of Planned Parenthood--Planned Parenthood of Central and Northern Arizona--performs abortions. Therefore, the State withheld funds from Planned Parenthood of Southern Arizona on the basis of its activities that were construed as "counseling for abortion procedures" or "abortion referral." Planned Parenthood challenged both of these terms as vague in the district

court (although the court found only the former term to be vague). Therefore, Planned Parenthood had standing to challenge the statute on the ground that its terms are vague.

However, even if both Planned Parenthood entities performed abortions, we would have found standing to challenge the Arizona funding footnote. A different test of standing applies when the contention is that a statute places a prospective limitation on an individual's exercise of his first amendment expression right and the statute is so vague that a person of reasonable intelligence cannot determine what the boundaries of that limitation are. The Supreme Court noted this distinction in Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission:

> The Wisconsin court's reliance on Broadrick v. Oklahoma, 413 U.S. 601 [93 S.Ct. 2908, 37 L.Ed.2d 830] (1973), for the proposition that

> one whose conduct falls squarely within an otherwise valid proscription may not challenge that proscription on grounds of vagueness, is inapposite. The challenged portion of the order is designed to govern speech and conduct in the future, not to punish past conduct, and as such it is the essence of prior restraint.

429 U.S. 167, 177, 97 S.Ct. 421, 427, 50 L.Ed.2d 376 (1976).

Even in its Broadrick decision, the Supreme Court acknowledged that the special protection afforded to first amendment rights includes use of a more liberal test of standing in overbreadth cases:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit--in the First Amendment area--"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requi-

> site narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

413 U.S. at 611-12, 93 S.Ct. at 2915-16 (citations omitted). As an otherwise eligible recipient of state funds, Planned Parenthood has standing to contend that the statute did not give adequate notice of what sorts of statements its members and staff must refrain from making in order for Planned Parenthood to remain eligible to receive state family planning services funds. See, e.g., Hynes v. Mayor of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) (candidate for political office and campaign workers successfully challenged statute regulating campaign activities as not adequately specifying which campaign activities re-

quired advance notice to police department).

While we are satisfied that Planned Parenthood had standing to challenge the footnote on a vagueness claim, we find that the claim is without merit.

A statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application," Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), for in that situation, the statute "fails to give a person of ordinary intelligence fair notice" of conduct proscribed or required by the statute, United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954), and encourages arbitrary and erratic behavior on the part of those officials charged with enforcing the statute, see Papachristou v. City of Jacksonville, 405 U.S. 156, 162,

92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The Supreme Court has set out the hazards of vague laws in even greater detail:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972) (footnotes omitted), quoted in Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362

(1982).

The level of scrutiny we must apply to a law challenged on the vagueness ground is not fixed. "The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depend in part on the nature of the enactment." Flipside, 455 U.S. at 498, 102 S.Ct. at 1193. A law that interferes with the right of free speech should receive relatively more stringent scrutiny. Id. at 499, 102 S.Ct. at 1194; see Grayned, 408 U.S. at 109, 92 S.Ct. at 2299. On the other hand, we are more tolerant of possible vagueness in laws that impose civil rather than criminal penalties "because the consequences of imprecision are qualitatively less severe." Flipside, 455 U.S. at 499, 102 S.Ct. at 1194; see Winters v. New York, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Our tolerance

should be even greater in a case, such as the one before us, where the consequence of noncompliance with the enactment is not a civil penalty, but merely reduction of a government subsidy.

In reviewing the challenged Arizona law, we are mindful that "due process does not demand unattainable feats of statutory clarity," United States v. Maude, 481 F.2d 1062, 1068 (D.C.Cir. 1973), and that "absolute precision in drafting laws is not demanded," particularly where the law does not impose a criminal penalty. High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982). We note that in the present case Planned Parenthood represented to this court that it has kept separate accounts and ledgers for the abortion-related activities covered by the challenged footnote since the time that footnote went into effect. This demonstrates that Planned Parenthood was able to derive

sufficient guidance from the statute to determine which activities were disfavored by the State of Arizona. Planned Parenthood argues that while it understands the statute's scope, it has been unable to receive an interpretation of the footnote from the Arizona officials administering the program, and so the organization fears that its interpretation will differ from that of the State. Substantial numbers of lawsuits arise out of disagreements over the precise meaning of a statute. The potential for such differences of opinion cannot be enough to render a statute void for vagueness.

Moreover, although the program administrators may have declined to give a legal opinion interpreting the challenged term, the state attorney general issued an opinion concerning a predecessor to the footnote actually enacted in which he expounded upon the limits of the phrase

"counseling for abortion procedures." Cf. Smith v. Goguen, 415 U.S. 566, 580 n. 29 (majority opinion) & 597 (Rehnquist, J., dissenting), 94 S.Ct. 1242, 1251 n. 29 & 1259, 39 L.Ed.2d 605 (1974) (looking to opinions of state attorney general for guidance in determnining vagueness of statute). According to the attorney general's opinion, the term "counseling for abortion procedures" applies to "counseling insofar as such counseling explains abortion procedures. That is not to say that a doctor . . . may not use the word 'abortion' in his consultation with his patient. The footnote should not be construed to interfere with the doctor-patient privilege and the doctor's obligation to his patient." Ariz.Att'y Gen.Op. No. I79-252 at 3 n. 5 (Oct. 11, 1979). This definition serves to answer the rhetorical questions the district court put forth in explaining its rationale for de-

claring the law void for vagueness. 537 F.Supp. at 92.

Throughout its brief to this court, Planned Parenthood used the terms "counseling for abortion procedures" and "abortion counseling" interchangeably. Had the state legislature used the latter term, Planned Parenthood's vagueness claim would have been stronger. We find that "counseling for abortion procedures" is a more narrowly drawn term. The term "abortion procedure" is commonly used to refer to the actual operation performed by medical personnel in carrying out the abortion. See, e.g., Roe v. Arizona Board of Regents, 113 Ariz. 178, 180, 549 P.2d 150, 152 (1976). Thus, the reasonable person would understand the statute to refuse funding for counseling activities closely tied to the actual abortion operation, such as preparing a woman who has already decided to have an abortion for the medi-

cal treatment she is about to undergo.

We reverse the district court's finding that the term "counseling for abortion procedures" is impermissibly vague.

IV. Preliminary Injunction

Although the district court, on February 8, 1982, decided this case on the merits and instituted a permanent injunction against enforcement of the Arizona statute, the State of Arizona seeks to appeal the preliminary injunction granted by the district court on October 6, 1980. The State invokes the eleventh amendment in arguing that the district court erroneously granted the preliminary injunction. We have twice declined to hear the appeal on the ground that imposition of the permanent injunction made the question moot.

On January 4, 1982, we dismissed the first appeal on the basis of Planned Parenthood's representation that a permanent

injunction had been granted. In fact, the district court announced orally that it would issue a permanent injunction on April 6, 1981, but did not enter a written order until February 8, 1982. Arizona thus claims that it was deprived of its rightful appeal on January 4, 1982, because of Planned Parenthood's misrepresentation. On March 25, 1982, we rejected Arizona's second attempt to appeal the imposition of the preliminary injunction, determining that the question of whether or not there actually had been a permanent injunction in effect on January 4, 1982, was mooted by the uncontested fact that a permanent injunction was in effect as of February 8, 1982.

In asking for reconsideration of our March 25, 1982 ruling, Arizona is asking us to ignore the "law-of-the-case" doctrine, which states that the decision of a legal issue by an appellate court must be

followed in all subsequent proceedings in the same case at either the trial or appellate level. Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982). The discretion of an appellate court to review its earlier decisions should be exercised sparingly in order to avoid undermining the policy of finality that underlies the rule. Id. at 834; see Lathan v. Brinegar, 506 F.2d 677, 691 (9th Cir. 1974) (en banc). Thus, the law-of-the-case doctrine applies "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967), quoted in Moore, 682 F.2d at 834.

Arizona argues that we should hear its current appeal of the preliminary in-

junction notwithstanding the imposition of the permanent injunction and our previous decision that the appeal was moot, because the constitutional question raised is one that is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). In other words, Arizona argues that it and other states will in the future be subject to such questionable preliminary injunctions, but may never be able to receive a hearing from an appellate court because imposition of a permanent injunction will always moot the appeal.

In the absence of a class-action suit, the "capable of repetition, yet evading review" doctrine is limited to situations where two elements combine: (1) the challenged action was of limited duration, too short to be fully litigated prior to its cessation or expiration; and (2)

there is a reasonable expectation that the same complaining party will be subjected to the same action again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975) (per curiam). The doctrine has been invoked in cases where a court order, by its own terms, expired in a few days or in cases where the question raised was mooted by the termination of a nonjudicial activity that is usually of short duration. See, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546-47, 96 S.Ct. 2791, 2797-97, 49 L.Ed.2d 683 (1976) (pre-trial publicity order expired once jury impaneled); Carroll v. President of Princess Anne, 393 U.S. 175, 178-79, 89 S.Ct. 347, 350-51, 21 L.Ed.2d 325 (1968) (10-day order); Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973) (human gestation period too short to allow completion of appellate procedure); Trans International

Airlines, Inc. v. International Brotherhood of Teamsters, 650 F.2d 949, 956 n. 5 (9th Cir. 1980) (great majority of economic strikes do not last long enough for complete judicial review).

A preliminary injunction is not a court order that expires after the passage of a prescribed or fixed amount of time; it remains in effect until the district court can hold a full hearing on and decide the merit of the case. A preliminary injunction may well be in effect long enough to allow appellate review. Indeed, we hear many appeals of preliminary injunctions. See, e.g., Painting and Decorating Contractors Association v. Painters and Decorators Joint Committee, 707 F.2d 1067 (9th Cir. 1983); Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197 (9th Cir. 1980); Munoz v. County of Imperial, 604 F.2d 1174 (9th Cir. 1979), vacated, 449 U.S. 54, 101

S.Ct. 289, 66 L.Ed.2d 258 (1980). It is true that Arizona or some other state may be subjected to a similar preliminary injunction in the future. However, it is quite possible that another preliminary injunction against a state may be in effect long enough to allow appellate review of the issues Arizona now seeks to raise. Therefore, this situation does not meet the criteria for invoking the "capable of repetition, yet evading review" exception to the doctrine of mootness. Moreover, because of the complexity and importance of the eleventh amendment question the State of Arizona seeks to bring before us, we believe it would be preferable to address such issues in a context that presents live, rather than hypothetical, issues.

None of the exceptions to the law-of-the-case doctrine apply in the present situation. We are bound by our ruling on

March 25, 1982, that the questions raised by the imposition of a preliminary injunction against the State of Arizona were mooted by the imposition of the permanent injunction, and we dismiss Arizona's appeal of the preliminary injunction.

V. Attorneys' Fees

Because we are remanding this case, we vacate the attorneys' fee award pending the outcome on reconsideration. However, we note that we find nothing improper in the manner in which the district court computed the attorneys' fee.

The district court computed the amount of the award by first determining the number of allowable hours Planned Parenthood's attorneys spent on the case and multiplying this number by their customary hourly rate. The resulting product, $36,278, was labeled the "lodestar" amount. The district court then considered the

controversy surrounding the issues involved in the litigation, the importance of those issues, the contingent nature of the fee arrangement between the plaintiffs and their attorneys, the novelty and complexity of the issues involved, the time pressure placed on the plaintiffs' attorneys, and the reputation, experience, and ability of the plaintiffs' attorneys. On the basis of these factors, the district court decided to increase the lodestar amount by a multiplier of 10%.

Arizona argues that 42 U.S.C. § 1988 provides for an award of "reasonable attorneys' fees," and that a reasonable attorneys' fee would be an amount equal to the number of attorney hours expended multiplied by the customary hourly rate charged by the attorneys (i.e., the district court's lodestar amount). According to Arizona, any sum awarded beyond the lodestar amount is more closely akin to

punitive damages than to reasonable attorneys' fees. However, Arizona's definition of a reasonable attorneys' fee award contradicts clear precedent in this court. In Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), we established 12 factors that a district court should consider in determining a reasonable attorneys' fee award. Among those considerations were (1) the time and labor required; and (2) the customary fee. If the State of Arizona were correct in its assertion, only these two factors would be relevant considerations. Yet Kerr set forth 10 additional factors. Id. The list of factors adopted in Kerr closely parallels the factors considered by the district court in the present case.

In addition to setting forth a list of factors, we explicityly stated in Kerr that failure to consider such factors when

determining the amount of an attorneys' fee award is an abuse of discretion. Id. Thus, the district court's adjustment of the attorneys' fee award to reflect factors other than the number of hours of attorney time expended and the normal hourly rate was not only allowed, but required, by the Kerr decision. The district court considered the necessary factors and there is nothing to suggest that the court abused its discretion in any way in determining the appropriate "multiplier" or adjustment factor. Cf. Hensley v. Eckerhart, ___ U.S. ____, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983) ("exceptional success" may justify enhanced attorneys' fee award).

REVERSED AND REMANDED.

APPENDIX D

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED FEBRUARY 8, 1982

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corporation; Planned Parenthood of Southern Arizona; Jack Bashaw, M.D., on behalf of himself, his patients, and all others similarly situated, Plaintiffs,

v.

The STATE OF ARIZONA; Bruce E. Babbitt, individually and as Governor of the State of Arizona; William Jamieson, individually and as Director of the Department of Economic Security; Robert K. Corbin, individually and as Attorney General of the State of Arizona, Defendants.

No. CIV 80-665 PHX WEC.

United States District Court,
D. Arizona.

Feb. 8, 1982.

ORDER

Plaintiffs are private non-profit Arizona corporations which provide a full range of family planning services, counseling for abortion procedures, and the dissemination of general abortion information. Prior to the passage of a General Fund Appropriations Bill by the Arizona State Legislature, plaintiffs had been

funded in part with Federal funds, and in part with State "in kind" matching funds, under Title XX of the Social Security Act, 42 U.S.C. § 1397.

A footnote to the abovementioned Appropriations Bill prohibited state money from being given to agencies or entities which offer abortions, abortion procedures, "counseling for abortion procedures" or "abortion referrals". But for the footnote in question the plaintiffs would be fully qualified to receive a portion of the state funds.

The right to advertise and disseminate abortion information was clearly recognized in Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). Furthermore, counseling patients in regards to abortion procedures or abortion referrals is protected by the First Amendment. Young Women's Christian Ass'n of Princeton, N.J. v. Kugler, 342 F.Supp.

1048 (D.N.J. 1972).

It is a well settled principle of constitutional law that governmental regulations limiting free speech rights, which seek to stifle a communication because of its content are fundamentally at odds with the First Amendment. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Because the primary purpose of the footnote is to limit the constitutionally protected communication of abortion information, the footnote must be declared unconstitutional.

In order for the plaintiffs to continue to be eligible recipients of the state funds they must comply with the dictates of the footnote. Such compliance necessarily means that the plaintiffs would be prohibited from exercising their First Amendment right to disseminate abortion information.

It is clear from the abovementioned

cases that the First Amendment prohibits the state from directly restricting the plaintiffs from engaging in "abortion counseling" or "abortion referral". By way of the footnote to the Appropriations Bill however, the State in attempting to restrict the plaintiff's freedom of speech tries to accomplish indirectly what it cannot do directly. This attempt to usher through the "back door" a result which the state could not accomplish directly was rejected by the Supreme Court in Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). There, the Court held:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on the basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a

> person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible."

Furthermore, the footnotes prohibition against "counseling for abortion procedures" is sufficiently vague to render the legislation in question void. Does "counseling" refer to the act of advocating abortion as an alternative to pregnancy and childbirth, or does it merely refer to volunarily offering advice on abortion? If a pregnant woman seeks advice on the alternatives to pregnancy, must the plaintiffs refrain from even mentioning abortion as an alternative? Must the plaintiffs refrain from mentioning the abortion alternative even where an abortion may be medically necessary to save the life or

preserve the health of the patient?

The due process clause of the Fourteenth Amendment prohibits deprivation of liberty or property without due process of law. It is well established that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed.2d 888 (1939); Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

A vague statute is especially vulnerable to constitutional attack when it impinges upon the exercise of protected constitutional rights, such as freedom of speech. Keyishian v. Board of Regents, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17

L.Ed.2d 629 (1967).

In the final analysis, due to the footnote's ambiguity the plaintiffs will be forced to guess whether they are in violation of the law when they engage in an abortion related conversation with one of their clients. The danger of liability for incorrectly interpreting the footnote will undoubtedly have a chilling effect on the exercise of the plaintiff's constitutional right of freedom of speech. This the Constitution will not permit.

It is well established that a challenged statute which impinges upon a fundamental constitutional right, such as freedom of speech, will be subject to strict scrutiny by the courts and will be stricken if the infringement does not serve a compelling state interest. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Arizona has not shown any compelling state

interest which justifies the necessity of the footnote and which overrides the private rights of the individual plaintiffs.

For the reasons mentioned above, this Court declares the footnote in question to be unconstitutional and therefore the State is permanently enjoined from enforcing said footnote.

FOOTNOTE

1. On this point we stated: "[W]e vacate the attorneys' fee award pending the outcome on reconsideration. However, we note that we find nothing improper in the manner in which the district court computed the attorneys' fee." In this circuit, dicta are "not part of the law of the case." Russell v. Commissioner, 678 F.2d 782, 785 (9th Cir. 1982). We are, therefore, free to disregard our earlier statements on this point.

APPENDIX E

NOTICE OF APPEAL

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corp., et al., Plaintiffs/Appellees, v. The STATE OF ARIZONA, eT al., Defendants/Appellants.	No. 85-1612 (U.S.D.C. No. CIV 80-665 PHX WEC NOTICE OF APPEAL (Filed July 3, 1986)

Please take notice that the defendants/appellants appeal to the United Supreme Court from the judgment and decision of the Court of Appeals dated May 15, 1986

. . .

in the above-captioned case.

DATED this 1st day of July, 1986.

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(2)

Supreme Court, U.S.
FILED
SEP 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-369

UNITED STATES SUPREME COURT
October Term, 1986

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security and ROBERT K. CORBIN, Attorney General of the State of Arizona,
Appellants,

v.

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
Appellees,

On Appeal from the
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MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the Court of Appeals properly struck down an Arizona law which imposed a condition on eligibility for state funding making ineligible any agency that, even with separate, private or federal funds, engages in constitutionally protected but disfavored activities, including abortion services, counseling and referrals.

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NO. 86-369

UNITED STATES SUPREME COURT

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BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security and ROBERT K. CORBIN, Attorney General of the State of Arizona,
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PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
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On Appeal from the
United States Court of Appeals
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MOTION TO AFFIRM

Appellees move, in accordance with Rules 16.1(c) and 16.1(d) of this Court's Rules, to affirm the judgment of the Court of Appeals for the Ninth Circuit. As we show, the questions on

which the decision of this case depend are so insubstantial as not to require briefs on the merits or oral argument for their resolution.

The judgment below was clearly correct. The court of appeals, in affirming the grant of summary judgment to appellees, did no more than apply well established principles concerning penalties on the exercise of First Amendment rights, to the undisputed facts found by the district court on remand.

STATEMENT OF THE CASE

The Act

This case arises out of a footnote appended by the Arizona Legislature to its 1980 appropriation to the Arizona

Department of Economic Security. Ariz. Laws 1980, Ch. 244, subd. 25.1/

The appropriation at issue imposes two separate conditions on all state funding for any program. First, it precludes state monies from being spent on abortion-related activities; and second, it restricts eligibility for state money only to those entities which do not, even

---

1/ The statute reads as follows:

> No state money may be spent by the Department of Economic Security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.
>
> No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the Department of Economic Security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph. Ariz. Laws 1980, Ch. 244, subd. 25.

with private funds, offer abortion services or abortion counseling or referrals.2/

2/ These sections were not treated as severable by either the district court or the court of appeals, nor did the State ever contend that they were severable. The statute was ultimately invalidated in its entirety because of the unconstitutionality of the second section. Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986) ("Planned Parenthood II"). The court of appeals upheld the restriction in the first section, Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983) ("Planned Parenthood I"). Planned Parenthood has filed a conditional cross-appeal to this Court, pertaining to the first section of the statute, to assure that, if jurisdiction is noted with respect to the State's appeal, the questions presented to the Court will include issues related to both sections of the statute. See Planned Parenthood's conditional cross-appeal, docketed Sept. 5, 1986.

The only private entities affected by this statute are appellees Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona; and the evidence shows, in fact, that the purpose of the appropriations restriction was to preclude Planned Parenthood or any of its affiliates from receiving any state grants, contracts or benefits until it restricted (to some indefinite extent) its abortion-related activities -- including certain non-pejorative speech about abortion.3/

3/ The record below shows that, in its 1979 appropriation, the Arizona Legislature enacted a funding restriction which stated: ". . . [N]o state general fund monies may be appropriated to Planned Parenthood or any of its affiliates." The Arizona Attorney General issued an opinion that this restriction was unconstitutional, prompting the Legislature to attempt to accomplish the same end indirectly, through passage of the legislation here at issue. See, Wallace v.

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Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (hereinafter Planned Parenthood) are Arizona nonprofit corporations. They offer family planning services, and comprehensive counseling on all pregnancy options including abortion and, when appropriate, abortion referrals. Planned Parenthood of Central and Northern Arizona also offers first trimester abortions. Dr. Bashaw was, at the time this action was commenced, the Medical Director of Planned Parenthood of Central and Northern Arizona, and was thus directly

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Jaffree, ___ U.S. ___, 105 S. Ct. 2479 (1985) (legislation of preceding year mandating periods of silence for meditation in all public schools motivated by same religious purpose as subsequently enacted statute permitting periods of silence for meditation or voluntary prayer).

involved in providing counseling and other abortion services to Planned Parenthood's patients.

This case arose when Planned Parenthood sought state funds in 1980 for a 10% matching grant for family planning services under Title XX of the federal Social Security Act, 42 U.S.C. 1397 et seq. During the period relevant to this suit, the federal government reimbursed the State for 90% of expenditures made for qualified family planning services, requiring the providing agency to secure a 10% matching grant from state or private sources. 45 C.F.R. §§ 228.53-54 (1978) (recodified 1980, repealed 1981).4/

4/ The federal matching fund program under Title XX has been discontinued. 42 U.S.C. § 1397a(a)(1) (Supp. III 1979), amended by 42 U.S.C. § 1397(a) (Supp. V 1981); 45 C.F.R. § 288.70 et seq. (1978) (recodified 1980; repealed 1981).

In order to comply with the Arizona law, the Arizona Department of Economic Security withheld state funds from Planned Parenthood because of Planned Parenthood's known association with abortion and open discussion about the abortion option in its other programs. (Planned Parenthood continued to receive federal Title XX monies, however, by using private funds for the 10% matching requirement.) Planned Parenthood brought suit to enjoin enforcement of this restriction.

Subsequent to 1980, the Arizona Legislature has not reenacted this appropriations rider, nor is the federal matching fund program currently available under Title XX. 42 U.S.C. § 1397a(a)(i) (Supp. III 1979), amended by 42 U.S.C. § 1397(a) (Supp. V 1981); 45 C.F.R. § 288.70 et seq. (1978) (recodified 1980; repealed 1981).

There is currently no state money available for family planning or pregnancy counseling services. However, pursuant to the preliminary injunction issued in the district court on October 6, 1980, Planned Parenthood received $4,700 from the State which, presumably, it would be required to return if this Court were to reverse the Ninth Circuit.

Proceedings Below

On October 6, 1980, after an evidentiary hearing, the district court preliminarily enjoined the State from enforcing the statute, and ordered the State to provide the 10% matching funds to Planned Parenthood.5/ On February 9, 1982,

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5/ Emergency appeals were taken by the State, seeking a stay on enforcement of the preliminary injunction. The Ninth Circuit Court of Appeals denied the application; the U.S. Supreme

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the district court issued a permanent injunction declaring the footnote unconstitutional because it infringed Planned Parenthood's freedom of speech and privacy rights, and was void for vagueness. Planned Parenthood v. Arizona, 537 F. Supp. 90 (D. Ariz. 1982) (see Appendix D to State's Jurisdictional Statement).6/ This decision was appealed to the Ninth Circuit Court of Appeals.

On October 18, 1983, the circuit court reversed and remanded, Planned

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Court granted a stay on December 18, 1980. After briefing, the stay was vacated on January 12, 1981.

6/ The district court did not differentiate between the limitation on abortion speech with state monies contained in paragraph one of the statute, and the limitation on abortion speech even with private monies contained in paragraph two. It found both to be unconstitutional limitations on free speech under the First Amendment, unjustified by any state interest. 537 F. Supp. 90.

Parenthood I, 718 F.2d 938 (9th Cir. 1983) (see Appendix C to State's Jurisdictional Statement), holding that the first section was constitutional on the grounds that the state could promote the "choice" for childbirth by requiring state-funded pregnancy counseling programs to make childbirth more attractive by withholding information about abortion.7/ However, the Ninth Circuit, examining the statute

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7/ The Ninth Circuit did not address the free speech or privacy right of women patients who would, unknowingly, receive one-sided, biased information. Indeed, the court of appeals, in seeking to justify its ruling in Planned Parenthood I, found -- apparently, as a matter of fact -- that the first paragraph of the statute "has imposed no restrictions on access to abortions or the free flow of information concerning abortion," Planned Parenthood v. Arizona, 718 F.2d 938, 944 (9th Cir. 1983) (see Appendix C to State's Jurisdictional Statement). The record before the Ninth Circuit contained nothing to support this conclusion. See · conditional cross-appeal of Planned Parenthood, docketed Sept. 5, 1986.

as a whole, held that the second restriction on eligibility appeared to constitute a penalty on the named plaintiffs' First Amendment activities. Accordingly, it remanded the case to the district court, ordering the State of Arizona to prove that total ineligibility for all state funds was the only way to insure that Planned Parenthood would not use any state money to support abortion activities. Planned Parenthood I, 718 F.2d at 942-46.8/ On remand, in the district court, Planned Parenthood submitted undisputed affidavits and deposition evidence showing that its total exclusion from all state funding was not the only way to segregate

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8/ In Planned Parenthood I the court overturned the district court's ruling that the restriction was void for vagueness. Planned Parenthood's petition for rehearing was denied on December 12, 1983. See conditional cross-appeal of Planned Parenthood, docketed Sept. 5, 1986.

state funds from private funds. The State presented no evidence whatsoever on the issue of impossibility of monitoring9/, and, in an unpublished opinion, the district court entered summary judgment in favor of Planned Parenthood. (See Appendix B to State's Jurisdictional Statement.) This decision was then appealed to the circuit court. On May 15, 1986, the Ninth Circuit, after reviewing the facts de novo, affirmed the district court and held the statute unconstitutional in its entirety because it penalized protected First Amendment activity. Planned Parenthood II, 789 F.2d 1348 (9th Cir. 1986)

9/ The State's only contention in the district court was that it had "proven" that Planned Parenthood of Central and Northern Arizona had violated the footnote's restrictions, and that the case was therefore "moot." Both the district court and the court of appeals rejected these unfounded assertions.

(see Appendix A to State's Jurisdictional Statement).

The State thereafter filed a notice of appeal to this Court. On August 6, 1986, Planned Parenthood received the State's Jurisdictional Statement. As there were apparently certain deficiencies in that document, the State served Planned Parenthood with a new Jurisdictional Statement on September 4, 1986.

REASONS WHY THE MOTION TO AFFIRM SHOULD BE GRANTED

I. THERE IS NO FEDERAL QUESTION OF SUBSTANTIAL MERIT; THIS COURT HAS CONSISTENTLY INVALIDATED STATUTES WHICH CONDITION ELIGIBILITY FOR GOVERNMENT FUNDS ON FORGOING CONSTITUTIONAL RIGHTS

The decision by the circuit court should be affirmed because it is consistent with this Court's repeated pronouncements that the State "may not deny a [government] benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech." Perry v. Sinderman, 408 U.S. 593, 597 (1973).

The Arizona statute imposes a classic penalty; indeed, it is one of the "extreme examples [that] are seldom ones that arise in the real world of constitutional rights." Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 908 (1982)

(Rehnquist, J. dissenting). Under the funding restriction, only those entities which do not engage in abortion-related activities, including speech, are eligible for state grants, benefits or contracts. The State of Arizona takes the position that this penalty is constitutional because it furthers the State's interest in promoting childbirth, and it ensures that no private entity which contracts with the State is "identified" with disfavored abortion-speech activities. (State's Jurisdictional Statement at 15) The only way Planned Parenthood would ever be eligible for a state contract in Arizona under this restriction would be for it to stop providing abortions, and to limit to some uncertain extent freely discussing abortion -- including giving full information about all legal options in its counseling and referral services. Planned Parenthood would also have to give up its

federal Title X family planning funds, since federal regulations require that family planning providers receiving Title X funds make all medically necessary referrals -- including abortion referrals. 42 U.S.C. § 300 et seq.; 42 C.F.R. § 595. See, Valley Family Planning v. State of North Dakota, 661 F.2d 99 (8th Cir. 1981).

There is no substantial federal question presented by the State's appeal.10/ The State cites no Supreme Court or other precedent that supports the imposition of a penalty on the exercise of

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10/ The United States government, in a case involving some of the same issues, agrees with the position of Planned Parenthood and the circuit court here: That it would constitute an unconstitutional penalty to condition eligibility for government grants on an applicant forgoing abortion speech. Alan Guttmacher Institute v.

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First Amendment or other constitutional rights. Indeed, this Court has held that:

> "For at least a quarter century, this court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech." Perry v. Sinderman, 408 U.S. 593, 597 (1972).

See also Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958); Keyishian v. Board of Regents of the University of New York, 385 U.S. 599, 605-6 (1967); Shapiro v. Thompson, 394 U.S. 618 (1969); and

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McPherson, 616 F. Supp. 195, 205 n. 9 (S.D.N.Y. 1985), appeal docketed 86-6075 (2d Cir. April 15, 1986).

Thomas v. Review Board, Indiana Employment Security Div., 450 U.S. 707 (1981).

More recently, in F.C.C. v. League of Women Voters, 104 S. Ct. 3106 (1984), this Court struck down a federal statute which banned editorializing by public broadcasting stations which receive federal grants, ruling that the stations were impermissibly forced to choose between ceasing to broadcast editorials and "giving up a substantive abridgement of important journalistic freedoms which the First Amendment jealously protects." 104 S. Ct. 3106, 3129. This case demonstrates the vigor with which this Court guards against restrictions on even arguably content-neutral subsidized speech. Indeed, the dissenting justices in F.C.C. indicated that if the speech restrictions in F.C.C. had been like the Arizona statute -- that is, imposed as a condition on eligibility, and viewpoint-based --

they would agree on its unconstitutionality. The dissent noted that government may not attach any "conditions to its largess when exercising its power to allocate its own public funds . . . ," nor may it make viewpoint-based distinctions "aimed at the suppression of dangerous ideas." F.C.C. v. League of Women Voters, 104 S. Ct. 3106, 3132. (Rehnquist, J., dissenting). See also Cornelius v. NAACP Legal Defense Fund, 105 S. Ct. 3439 (1985).11/

The issue presented by this statute was addressed in Harris v. McRae, 448 U.S. 297 (1980), where this Court observed that if the Hyde Amendment went further than not funding therapeutic

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11 In Cornelius, the Supreme Court held that it would be unconstitutional to exclude certain groups from the benefit of being included in the federal campaign fund if such exclusion was "impermissibly motivated by a desire to suppress a particular point of view." 105 S. Ct. 3439, 3455.

abortions, and sought to cut off all Medicaid benefits "from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion," that disqualification would be "analogous" to the legislation struck down as a penalty for the exercise of constitutional rights in Sherbert v. Verner, 374 U.S. 398 (1983). Harris v. McRae, 448 U.S. 297, 371, n. 19. Consistent with this ruling, federal district courts in North Dakota and Illinois have invalidated as unconstitutional statutes similar to the Arizona statute. Valley Family Planning v. State of North Dakota, 489 F. Supp. 238 (D. N.D. 1980), aff'd on other ground, 661 F.2d 99 (8th Cir. 1981); Planned Parenthood Association, Chicago

Area v. Kempiners, 568 F. Supp. 1490 (N.D. Ill. 1983).12/

12/ In Valley Family Planning, a state statute sought to deny all governmental funding to any family planning agency which performed, referred, or encouraged abortion, irrespective of whether any governmental funds were actually used for abortion-related purposes. The district court, finding that "a recipient of governmental benefits, such as Valley Family Planning, may not be required to surrender a constitutional right in order to obtain a benefit," 489 F. Supp. 238, 242, held the statute unconstitutional as an unwarranted abridgment of plaintiff's free speech rights. Similarly, in Kempiners, the court struck down an Illinois statute which disqualified from state funding all organizations which provided abortion counseling or referral services, holding that the statute constituted an unconstitutional penalty, as well as violating privacy and First Amendment rights. 568 F.Supp. 1490, 1499. The court declared:

> "[This case is] dramatically different from the facts of Harris v. McRae, 440 U.S. 297, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980), or Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977), where the state refused to fund

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II. THE HATCH ACT CASES RELIED ON BY THE STATE DO NOT CHANGE APPLICABLE PRINCIPLES OF CONSTITUTIONAL LAW

The State rests its entire argument that there is a substantial federal question on the ground that the circuit court in Planned Parenthood I flaunted purportedly directly applicable precedent in the Hatch Act cases.13/ The State asserts (State's Jurisdictional Statement

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> abortion services but did not disqualify applicants for state funds from receiving any other type of funding simply because they wished to have abortions." 568 F. Supp. 1490, 1495.

See also, Planned Parenthood Chicago Area v. Kempiners, 700 F.2d 1115, 1123-25 (7th Cir. 1983) (Cudahy, separate opinion), vacating and remanding, 531 F.Supp. 320 (N.D. Ill. 1981).

13/ The State refers to the following cases, which upheld the Hatch Act, and which Planned Parenthood will refer to collectively as "the Hatch Act cases": Oklahoma v. Civil Service Comm'n., 330

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at 11) that the Arizona statute involves a policy choice "identical" to the one in U.S. Civil Service Comm'n v. National Association of Letter Carriers, 413 U.S. 548 (1973), which involved the Hatch Act's prohibition against federal employees engaging in certain forms of partisan political activity. In order to support this analogy, the State argues that once it contracts with a private entity, that entity becomes a state agency and its employees become state employees.14/ (State's Jurisdictional Statement at

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U.S. 127 (1947); Civil Service Comm'n. v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

14/ If this were so -- that is, if Planned Parenthood became a state agency by virtue of its receipt of these funds -- then Planned Parenthood would be exempted from the statute's restrictions, since the legislation specifically exempts "governmental agencies or entities" from its reach.

10-11). The State argues, in effect, that the circuit court in Planned Parenthood I was precluded from applying any degree of judicial scrutiny to the funding restrictions, and that therefore the Ninth Circuit remand on the issue of whether the absolute disqualification on eligibility was necessary, was purportedly error.

This argument is novel, and would overturn the considerable case law recognizing the responsibility of the federal courts to engage in judicial scrutiny. The Supreme Court, in cases involving similar statutes using similar means to achieve identical state purposes, has subjected such statutes to careful judicial scrutiny. Compare, Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297. Indeed, the Hatch Act cases themselves (even if they had any applicability here), illustrate the careful scrutiny applied to such restrictions -- scrutiny

consistent with that undertaken by the lower courts in the present case. In addition, contrary to the State's assertion, the Hatch Act cases are easily distinguishable in at least three ways.

First. The decisions issued by the Supreme Court upholding the Hatch Act prohibition against public employees engaging in partisan political activities have, consistently, made clear that such restrictions would be impermissible if they were not applied in an evenhanded manner -- that is, if the prohibition of political activity was dependent upon the content of the speech or the point of view sought to be expressed. Thus, in Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Supreme Court, in upholding the statute, held:

> "[The statute] is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and

> Fourteenth Amendments. But at the same time, [the statute] is not a censorial statute, directed at particular groups or viewpoints . . . The statute, rather, seeks to regulate political activity in an evenhanded and neutral manner." 413 U.S. 601, 616.

See also, Letter Carriers, 413 U.S. 548, 564. ("The restrictions so far imposed on federal employees are not aimed at particular parties, groups or points of view, but apply equally to all parties and activities of the type described."). In contrast, the Arizona statute is aimed only at suppressing nonpejorative abortion speech, including abortion counseling and referral.

Second. The restrictions in the Hatch Act cases were based on a finding that the legislation served a "great end" of the government -- "impartial execution of the laws" and avoidance of a political spoils system. Letter Carriers, 413 U.S. 548, 565. Here, the interest in promoting

fetal life at the expense of free speech rights is neither compelling, substantive, nor legitimate. Even accepting that the government's interest in promoting childbirth may be rational under some circumstances, Harris v. McRae, 448 U.S. 297, it cannot withstand scrutiny when the means used to achieve this end is to extinguish First Amendment rights and deliberately manipulate or withhold full information about constitutionally protected medical options. Carey v. Population Services International, 431 U.S. 678, 712-717 (1977) (Stevens, J., concurring); Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, 106 S. Ct. 2169, 2178-80 (1986); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).

Third. In the Hatch Act cases, ninety years of experience had shown that other remedial measures to promote a

nonpartisan civil service did not work. Letter Carriers, 413 U.S. 548, 558-564. In contrast, here, the State of Arizona did not even attempt to show (as required by the circuit court) that less restrictive means would have been inadequate to keep all state funds free from any abortion speech. Planned Parenthood I, 718 F.2d 938, 946.

In sum, the Hatch Act cases provide no support whatsoever for the State's contentions.

III. THE STATE HAS NOT SHOWN ANY ERROR IN THE COURT OF APPEALS' DECISION THAT THE STATE HAD NOT PROVEN THE IMPOSSIBILITY OF MONITORING THE USE OF STATE FUNDS. REVIEWING THE COURT OF APPEALS' FINDINGS OF FACT DOES NOT CONSTITUTE A SUBSTANTIAL FEDERAL QUESTION.15/

Subsequent to the Ninth Circuit's remand in Planned Parenthood I, the

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15/ The State's contention in this Court that "administrative impossibility" purportedly justified the cutoff of all state monies to Planned Parenthood is squarely inconsistent with the position taken by the State in the district court. The affidavit of the Director of the Department of Economic Security, William Jamieson, submitted by the State (Appendix A hereto) explained why the funding restrictions exempted agencies which provide comprehensive medical and dental care and care for the developmentally disabled. According to Jamieson:

> "Money for comprehensive medical and dental care and the developmentally retarded under the footnote in controversy is money used by the Department of Economic Security for medical and dental

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district court determined, as a matter of fact, that the State had failed to carry

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> expenses incurred by individuals who are wards of the State of Arizona. Since payments are made to doctors, hospitals and dentists who provided services to these wards throughout Arizona, it is administratively unfeasible to determine individually if each doctor, hospital or dentist does abortion or abortion-related activities. The above is the reason for distinguishing money for comprehensive medical and dental care and money for the developmentally retarded from money for family planning services." (Jamieson Affidavit, ¶ 2; emphasis added.)

In other words, in the district court, it was the State's position that "administrative unfeasibility" was the justification for excluding certain entities from the footnote's prohibition. However, in its Jurisdictional Statement, the State takes the contrary position that "administrative unfeasibility" necessitates Planned Parenthood's inclusion in the statute's prohibition. In its attempt to justify the funding cutoff, the

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its burden of establishing that it was "administratively impossible" for the State to monitor Planned Parenthood's use of state monies:

> "Subsequent to remand on this issue [i.e., administrative impossibility], plaintiffs moved for summary judgment, supported, inter alia, by affidavits, and by the deposition testimony of State officials, contending that no material fact issue precluding summary judgment existed with respect to the issue [of administrative impossibility].
>
> "Defendants have failed to present to this Court any material matter of fact with respect to the issue identified by the Ninth Circuit." January 7, 1985 Judgment of U.S. District Court (Appendix B to State's Jurisdictional Statement).

In its opinion, the court of appeals, reviewing de novo the fact findings of the district court, affirmed:

> ". . . Planned Parenthood has submitted convincing evidence on the

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> State has thus taken, in different courts, inconsistent positions.

> feasibility of monitoring the funds. The State has not controverted that evidence and even admits that Planned Parenthood of Southern Arizona has successfully segregated state funds from its abortion-related expenditures. We hold, after a de novo review, that the district court's grant of summary judgment on the constitutionality of paragraph two of the Arizona footnote as applied against Planned Parenthood and its patients was proper." 789 F.2d 1348, 1351.

Two courts have thus, upon independent review of the factual record, concluded in Planned Parenthood's favor on the purely factual "administrative impossibility" issue. It has long been an established principle, in furtherance of judicial finality, that concurrent fact-finding by the circuit and district courts should be upheld by this Court unless "clear error is shown." Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (1936), citing Stuart v. Hayden, 169 U.S. 1 (1898). This Court elaborated the "two

court rule" in Graver Tank and Mfg. Co. v. Linde Air Products Co.:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact-finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

336 U.S. 271, 275 (1949), quoted with approval in Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 153 (1950); cf. United States v. Johnston, 268 U.S. 220, 227 (1924) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Here, in a de novo review of the facts upon which the district court granted summary judgment, the circuit court affirmed the district court's findings and found, "[I]t is clear that on remand the showing made by the State does not establish the impossibility of monitoring funds. Affidavits by State

officials charged with distributing the funds, which are not controverted, established that monitoring was feasible." Planned Parenthood II, 789 F.2d 1348, 1351 (emphasis added). The State does not even attempt to show the required "clear error" in the circuit court's de novo review and affirmance of undisputed factual findings in the district court. It merely asserts, without support, that there was error. The argument that this Court is thus presented with a substantial federal question is groundless.16/

16/ The State's argument that attempt to justify the total cutoff of funds is justified on "administrative convenience" grounds has been addressed by the Supreme Court. In Frontiero v. Richardson, 411 U.S. 677, 690 (1973), the Court held:

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IV. CONCLUSION.

For all of the foregoing reasons, appellees respectfully submit that the appellants have presented no substantial question for the decision of this Court, and that the judgment entered in this cause by the district court (and affirmed

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> "Our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.' Stanley v. Illinois, 405 U.S. 645, 656, 31 L.Ed.2d 551, 92 S. Ct. 1208 (1972). And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality. See, Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969); Kerrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S. Ct. 775 (1965)."

by the court of appeals) should therefore be affirmed.

Respectfully submitted this 15 day of September, 1986.

SACKS, TIERNEY & KASEN, P.A.

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NO. 86-369

UNITED STATES SUPREME COURT
October Term, 1986

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security and ROBERT K. CORBIN, Attorney General of the State of Arizona,
Appellants,

v.

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
Appellees,

On Appeal from the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO MOTION TO AFFIRM

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APPENDIX A

November 1980 Affidavit

of William Stukey Jamieson, Jr.

A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, WILLIAM STUKEY JAMIESON, JR., being first duly sworn, depose and say:

1. That I am the Director of the Arizona Department of Economic Security (DES) and a defendant in the action entitled Planned Parenthood of Central and Northern Arizona, an Arizona corporation; et al., Plaintiffs, vs. The State of Arizona, et al., Defendants, United States District Court for the District of Arizona, CIV 80-665 PHX WEC; that I have been previously deposed by the plaintiffs;

2. That money for comprehensive medical and dental care and the developmentally retarded under the footnote in controversy is money used by the Department of Economic Security for medical and dental expenses incurred by individuals

who are wards of the State of Arizona. That since payments are made to doctors, hospitals and dentists who provided services to these wards throughout Arizona, it is administratively unfeasible to determine individually if each doctor, hospital or dentist does abortion or abortion-related activities. That the above is the reason for distinguishing money for comprehensive medical and dental care and money for the developmentally retarded from money for family planning services

/s/
WILLIAM STUKEY JAMIESON, JR.

SUBSCRIBED AND SWORN to before me this _____ day of November, 1980.

Notary Public

My Commission Expires:

_____